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BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of West Allis Service, Inc.)	
Stage 2 Vapor Recovery Grant Awards)	IH-95-19
for Facility #706)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held at Milwaukee, Wisconsin on February 21, 1996. The parties requested the opportunity to submit written closing arguments and the last brief was received on March 20, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

West Allis Service, Inc., by

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Milwaukee, Wisconsin 53214-4306

Department of Natural Resources, by

Thomas F. Steidl, Attorney
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FINDINGS OF FACT

1. West Allis Service, Inc. (West Allis or the Applicant), c/o Mark Frankowski completed filing an application with the Department of Natural Resources for a Stage 2 Vapor Recovery Grant for a vapor recovery system to be installed at West Allis Service, Inc facility located at 7920 West National Avenue in West Allis, Wisconsin.

2. The Department of Natural Resources (the Department or the DNR) received the application on September 13, 1994. On September 16, 1994, in a grant award letter, the Department notified Mr. Frankowski that "an award of up to \$24,841.00 had been approved by the DNR."

3. West Allis Service, Inc. applied for an advance payment on the Stage 2 Grant Award on November 14, 1994. The Department made an advance payment of \$18,631.00 to Mr. Frankowski by letter dated December 19, 1994. On the same day the DNR received the request of West Allis Service, Inc. for final payment of the award grant.

4. On April 21, 1995, the DNR approved an additional final payment of \$38.00 to West Allis Service, Inc. The final payment reflected a total grant that was revised downward to \$18,669.00 for the Stage 2 system installed by Mr. Frankowski. This represented a reduction of \$6,172.00 from the original estimated grant award calculated for West Allis Service, Inc.

5. Both parties agreed that some portion of the original grant award simply reflected an error in the DNR calculation. West Allis Service, Inc. concurs that the original grant award reflected an over-award of \$1,150.00 based on an error in the calculation of the cost for auxiliary items "as \$5,100.00 when the correct unit costs for the auxiliary items should have been \$3,950.00 per unit for two units." Mr. Frankowski testified that accordingly the applicant is seeking a total grant of \$22,716.00. This figure reflects the amount in the worksheet estimate made by Interstate Tank and attached to Exhibit 1 the original application. This figure further reflects the error in the calculation made by the Department of Natural Resources of \$2,300.00, based on DNR staff incorrectly using the unit costs for two retro-fitted auxiliary items, instead of the unit costs figure for two factory installed auxiliary items.

6. While both parties agree that the amount of the original award should be reduced to reflect the miscalculation of the Department, the parties dispute application of an adjustment of the cost table figures which became effective on February 10, 1995, to the final grant payment to West Allis Service, Inc. (See Exhibit 17) Mr. Frankowski argues that the Department retroactively applied revised cost table figures in its final grant award, and that West Allis Service, Inc. relied on the original grant estimate in determining what equipment to purchase for its service station facility.

7. The original set of cost tables were developed and became effective on May 1, 1993. (See: Exhibit 15) Mr. Robert Egan, DNR Stage 2 Grant Program Supervisor, testified that most of the cost table revisions found in Exhibit 16 and 17 were made in order to add newly CARB certified vapor recovery systems to the cost table. A significant modification of the actual unit cost factors reflected in cost tables occurred in the cost table revisions which became effective on February 10, 1995. As noted, it was this revision of cost tables which was applied to the final grant payment made to West Allis Service, Inc. Egan explained the Department's rationale and purpose for amending the first set of cost tables developed by DNR. Essentially the original cost data was provided by the U.S. Environmental Protection Agency (EPA) from information based on California's Stage 2 program and a list price provided by equipment suppliers. Egan testified that the original cost tables reflected a very limited data base relating to actual costs incurred in Wisconsin because the Stage 2 Vapor Recovery Program in the state was relatively new and contractors and equipment suppliers were reluctant to or unwilling to provide data on actual cost figures for installing such systems in the State of Wisconsin. The Department became aware of complaints that certain installation contractors and facility owners were profiting from the Stage 2 grant program because unit costs figures in the cost tables were higher than the actual cost being incurred by contractors.

8. Responding to these concerns, in the fall of 1994 Department staff made efforts to compare actual cost records with cost table values. The Department sent out a letter in December of

1994 to all eligible grant recipients alerting them to the Department's findings that actual costs were less than the amounts reflected in the cost tables and notifying grant recipients that the cost tables would be reduced to reflect this information. The Department showed that additional station records confirmed that the earlier cost table rates resulted in overpayments and the Department properly made the revision to the cost table which became effective on February 10, 1995.

9. While the Department had a reasonable basis for revising cost tables downward, it has not shown any reason why the revised cost tables should be applied to West Allis Service, Inc. West Allis made its application on September 13, 1994. The cost tables effective on that date, all parties agree, are those effective May 1, 1993, and found in Exhibit 15. The Department's later downward revision of the cost tables were effective more than three months after the Department issued its preliminary award, and over five weeks after all of the work at the site had been completed and West Allis Service re-opened for business. While the DNR had not yet made the final payment to West Allis, the change reflects a retroactive application of the cost tables revision under these circumstances. The general rule in Wisconsin is that legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively. Chappy v. LIRC, 136 Wis. 2d 172, 180, 381 N.W.2d 552 (1987). In the present case, it is necessary to construe the provisions of sec. NR 172.05(3), Wis. Admin. Code to determine whether cost table changes were intended to be applied retroactively. That subsection reads as follows:

(3) COST TABLE CHANGES. The department may, from time to time, revise the cost tables or add new tables to reflect actual cost experience or additions or changes in the stage 2 systems or components which meet the requirements of s. NR 420.045. When changes or additions are made, the department shall prepare revised tables and an explanation of the revisions and make them available to interested parties at least 45 days prior to the effective date of the new or changed cost tables.

The plain language of this subsection does not expressly confer authority on the Department to retroactively apply changes in cost tables to prior applicants and partial grant recipients such as West Allis Service. Nor is a reduction in the amount of an award after completion of work a necessarily implied authority under this provision. Accordingly, as a matter of law, the earlier cost tables, effective at the time of the application, govern payment of the award to West Allis Service.

10 Frankowski testified that West Allis Service, Inc. relied on the "contract" of the original award request and purchased a more expensive series of products than it would have were the amount of its grant award to have been \$6,000.00 less as the Department ultimately decided in this matter. There were numerous provisions indicating that the original award made was a provisional estimate of likely payment of a final award. As it turned out, the Department had made an error in its calculation of the grant award. The DNR clearly had authority to correct the amount of this error and reduce the amount of the award accordingly. However, further reduction of the award by means of retroactive application was to Mr. Frankowski and West Allis Service, Inc. was unreasonable given his reasonable reliance on the original grant award in making business decisions about which Stage 2 vapor recovery system to purchase. Accordingly, the proper amount of the award to West Allis Service, Inc. should be increased by \$4,047.00.

DISCUSSION

The Department has shown that its revisions to cost tables were reasonable and were based on solid evidence. The Department has also established that it was not necessary to promulgate the cost tables themselves as administrative code provisions. As DNR counsel notes, the language of sec. 144.405(5)(c) and (3) states in pertinent part that if the Department promulgates a rule under paragraph (e) it shall determine the cost based upon the rule promulgated under paragraph (e) . . . Under sub (e), the Department may determine by a rule the usual and customary costs of each item for which a grant may be awarded under this section. The rule shall establish cost tables and shall reflect the range of cost resulting from the differences of costs of construction, labor, equipment, supplies and other relevant factors throughout the state. While the language could be considered to require actual promulgation of cost tables as rules, the Department satisfied the statutory language of "establish(ing) cost tables" by creating the cost tables and making them available to interested grant recipients. As Mr. Steidl argues, the statute did not require the administrative code to "include cost tables but rather to establish cost tables"

While the Department had good reason to amend the cost tables downward and had legal authority to do so, the retroactive application of the revised cost tables to the grant award of West Allis Service, Inc. was fundamentally unfair. The administrative code does not authorize retroactive application of cost table reductions. NR 172.05(3), Wis. Admin. Code. As Mr. Brejcha argues in his brief, the applicant submitted its application in good faith based upon the status of the program and its requirements at the time of the application. West Allis Service, Inc. relied upon the award grant notification to choose the work to be performed and its attendant costs. The retroactive reduction of the payment to the applicant caused detrimental harm to the applicant by causing the applicant to select a more expensive contractor than he would have otherwise. In conclusion, the applicant is entitled to receive an additional sum of \$4,047.00 as part of his grant award. This amount reflects the original cost tables established prior to the application of West Allis Service, Inc.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders relating to grant awards for gasoline vapor recovery systems pursuant to secs 227.43 and 144.405, Stats.

2. Pursuant to sec. 144 405(4)(e), Stats., the Department shall award a grant to each applicant who submits a complete application under par. (b) for costs allowable under par (a). The amount of the grant may not exceed 95% of the first \$25,000 in costs and 90% of the next \$15,000 in costs incurred by the applicant. If the Department promulgates a rule under par. (e), it shall determine the costs based upon the rule promulgated under par. (e). The applicant has submitted a complete application and is entitled to a grant as set forth above. The amount of the original award exceeded the statutory maximum. The amount of the award as amended in the following Order does not exceed these statutory maximums.

3. Section 144.405(4)(e) reads as follows:

The Department may determine by rule the usual and customary costs of each item for which a grant may be awarded under this subsection. The rule shall establish cost tables and shall reflect the range of costs resulting from differences in costs of construction, labor, equipment, supplies and other relevant factors throughout the state.

The DNR complied with the statute by promulgating Chapter NR 172, Wis. Admin. Code and by establishing cost tables.

4. Pursuant to sec. NR 172.03(2), Wis. Admin. Code a "Grant award" means a fully executed grant agreement document between the Department and the owner or operator of a retail gasoline station.

5. Pursuant to sec. NR 172.06(1), the Department shall award grant funds to eligible projects through a contractual agreement between the department and the eligible applicant. The grant award document is a commitment of a certain grant amount by the Department and an agreement by the grantee to meet specified grant conditions regarding the installation and operation of the vapor recovery system. When signed by the Department and the grantee, the grant award provides the basis for the payment of grant funds. In its award of grant funding under this chapter, the Department may not exceed the funding level currently available to the Department for vapor recovery grants. In the event that currently available funding is not sufficient for all eligible projects for which the Department has applications pending, grant awards shall be made on the basis of the compliance date by which the project shall meet the stage 2 installation requirements.

6 Pursuant to sec. NR 172.05(2) the Department shall develop a standard table of usual and customary unit costs for each type of stage 2 vapor recovery system which meets the requirements of sec. NR 420.045. The cost tables values shall, to the extent practicable, be based on actual stage 2 installation cost experience within the state, as well as cost information from stage 2 equipment manufacturers and suppliers, the U.S. environmental protection agency studies and analyses and other states.

7 Each vapor recovery system grant is subject to the following conditions:

(a) The grant award is subject to sec. 144.405, Stats., and this chapter.

(b) The grantee commits to completion of all project work and agrees to pay, from other funds, the cost of all project work which is not paid for under the grant.

(c) The grantee agrees to comply with all requirements of secs. NR 420.045 and 425.035 regarding the installation, operation, testing and maintenance of vapor recovery systems.

(d) The grantee shall obtain any permits or approvals required by law to construct, install and operate the vapor recovery system covered by this grant

(e) The grantee agrees that department representatives will have access to the project site during the preparation, construction and post-construction phases of the project. The grantee further agrees to allow department representatives access to any books, documents, plans, reports, papers and other records which are pertinent to the project, whether these records are maintained by the grantee or its constructor.

(f) The grantee understands and accepts that the final payment under the grant may not be made until the department has determined that the vapor recovery system is operating at a level which meets vapor emission standards under sec. NR 420.045.

Section NR 172.06(4), Wis. Admin. Code.

The provisions of sub. (f) above do not apply to the downward revision of the award in this matter because the system is operating at required levels.

8. Legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively. Chappy v. LIRC, 136 Wis. 2d 172, 180, 381 N.W.2d 552 (1987).

9. Section NR 172.05(3), Wis. Admin. Code, set forth above, on its face does not by express language or necessary implication indicate an intent to be applied retroactively.

ORDER

WHEREFORE IT IS HEREBY ORDERED that the Department of Natural Resources' Stage 2 Vapor Recovery award made to West Allis Service, Inc. be increased in the amount of \$4,047.00.

Dated at Madison, Wisconsin on April 23, 1996.

STATE OF WISCONSIN
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By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.